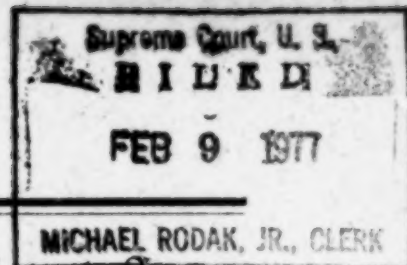


No. 76-797



In the Supreme Court of the United States

OCTOBER TERM, 1976

RURAL FOODS, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

DANIEL M. FRIEDMAN,
*Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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In November 1971, petitioner, Rural Foods, Inc., a retail food store, brought suit in the United States District Court for the Eastern District of Virginia, seeking to set aside a determination by the Department of Agriculture disqualifying petitioner from participating in the federal food stamp program for a period of one year. The disqualification was based upon administrative findings that petitioner had committed thirteen separate violations of the Food Stamp Act of 1964 and implementing regulations.

Under Section 11 of the Food Stamp Act of 1964, 78 Stat. 703, 7 U.S.C. 2020, the Secretary is directed to disqualify a retail food store from participating in the food stamp program "on a finding * * * that such store * * * violated any of the provisions of the [A]ct, or of the regulations issued pursuant to the [A]ct." The disqualification "shall be

for such period of time as may be determined in accordance with regulations issued pursuant to this [Act]." *Ibid.* Under regulations promulgated by the Secretary, a food store found in violation of the Act or regulations may be disqualified "for a reasonable period of time, not to exceed three years * * *." 7 C.F.R. 272.6(a).¹ Pursuant to 7 U.S.C. 2022(c), a store aggrieved by a final administrative determination may seek judicial review in a district court "to set aside such determination" and such review "shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue."

After disqualification by the Department of Agriculture, petitioner sought review in the district court, denying that the charged violations had occurred, and claiming that, in any event, the one-year sanction was harsh and unfair. After a hearing, the district court upheld the disqualification action, finding that petitioner had committed each of the thirteen charged violations. The court held that it had no authority to review the sanction imposed, relying on the then controlling Fourth Circuit precedent, *Welch v. United States*, 464 F. 2d 682. The court of appeals affirmed, 489 F. 2d 754, and this Court denied certiorari, 419 U.S. 827.

Some months later the Fourth Circuit in an *en banc* decision, *Cross v. United States*, 512 F. 2d 1212, overruled *Welch* and held that the courts had the authority to modify a period of disqualification determined to be arbitrary and

¹Guidelines have been issued by the Food and Nutrition Service (FNS), Department of Agriculture, to responsible agency officials setting forth criteria for imposition of particular periods of disqualification within the three-year range specified in the regulation. See FNS (FS) Instruction 744-9, issued March 13, 1970. A copy of these guidelines, introduced as plaintiff's exhibit No. 3 at the July 7, 1975 district court hearing, was reproduced in the Joint Appendix (pp. 133-146) filed with the Court of Appeals (hereinafter referred to as "J.A.").

capricious. Upon petitioner's motion, the district court, pursuant to Rule 60(b)(5) and (6), Fed. R. Civ. P., reinstated petitioner's case for trial on the validity of the period of disqualification and, after further proceedings, ordered the period reduced from one year to six months (Pet. App. 46). According to the district court, "[w]eighing all of the factors and the criteria prescribed by the Regulations for fixing the period of suspension it seems to me the facts bring this case within the six months suspension period" (Pet. App. 43).

The court of appeals reversed. The court emphasized that the sanction imposed by the Secretary was to be given " 'very great, if not conclusive, weight,' " and held that the lower court's determination that a six-month rather than a one-year sanction was called for in this case "was not warranted by the limited scope of review and the test articulated in *Cross*" (Pet. App. 24). The court of appeals stated (Pet. App. 24-25):

It is clear that [petitioner's] extreme transgressions fell within the Secretary's criteria and definitions for a one-year period of disqualification. Since his determination was not "unwarranted in law or without justification in fact" the sanction was neither arbitrary nor capricious, and the district court was without authority to reduce it to six months.

The court of appeals' decision is correct; further review by this Court is not warranted.

1. The one-year disqualification fixed by the agency on account of petitioner's numerous and serious violations of the Food Stamp Act of 1964 and implementing regulations is valid. Where, as here, "Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *Butz v. Glover Livestock Commission Co.*,

411 U.S. 182, 185. An administrative sanction is not to be overturned upon judicial review unless it is either unwarranted in law or without justification in fact (*id.* at 185-186).

Petitioner committed numerous serious violations of the Food Stamp Act of 1964 and regulations. The evidence establishes that petitioner discounted food stamps for cash and accepted food stamps in exchange for alcoholic beverages and other major nongrocery items (J.A. 11-20, 48-53). The violations were committed after petitioner had been visited on two occasions by FNS officials to ensure petitioner's compliance with food stamp regulations; the participation in these illegal sales by management personnel demonstrated that they were matters of store policy (J.A. 48-53, 147, 149). Under the agency guidelines, a one-year sanction is indicated where the retailer as a matter of store policy has discounted food stamps for cash or accepted food stamps for alcoholic beverages (J.A. 143-144). The one-year disqualification imposed by the agency here was not "unwarranted in law or unjustified in fact."

2. Petitioner contends (Pet. 16-19), however, that absent an abuse of discretion, the court of appeals should not have upset the district court's assessment that a six-month penalty was called for under the pertinent criteria, especially in light of more lenient sanctions imposed in similar cases.

It is the agency's, not the district court's, determination that is ultimately the subject of review, and the agency's view as to the appropriate sanction must be afforded "very great, if not conclusive, weight." *Cross v. United States*, *supra*, 512 F. 2d at 1218. See also *Camp v. Pitts*, 411 U.S. 138. Under the agency guidelines, a six-month sanction is too lenient where the retailer has discounted food stamps for cash or, after compliance action by the agency, accepted food stamps for major non-grocery items (J.A. 144). Moreover, similar violations need not always result in similar

sanctions.² "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz v. Glover Livestock Commission Co*, *supra*, 411 U.S. at 187.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.

²The district court noted that of the four other food stores in the area found to be in violation of the food stamp regulations, none had received a one-year suspension (Pet. App. 42a). The evidence presented below demonstrates that in three of those cases, however, either the violations did not approach the magnitude and seriousness of those here or there had not been sufficient compliance action by FNS personnel to warrant a one-year penalty (J.A. 88-92, 114-130). Only in one case did the circumstances even approximate those involving petitioner (J.A. 93-94); that store received a six-month sanction. That one instance would not warrant overturning the one-year sanction imposed by the agency here. See *Butz v. Glover Livestock Commission Co.*, *supra*, 411 U.S. at 188; *Cross v. United States*, *supra*, 512 F. 2d at 1217, n. 8.

³Contrary to petitioner's argument (Pet. 17-18), the agency did not ignore its own regulations (the FNS guidelines) in imposing a one-year sanction. The circumstances surrounding petitioner's violations clearly satisfied the criteria for a one-year disqualification.